

BEFORE THE
BOARD OF TRUSTEES OF THE
MOUNTAIN VIEW SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Reduction in Force of
Certain Employees of the Mountain View
School District Identified in Appendices A
and B.

OAH No. 2011030959

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Ontario, California, on April 18, 2011.

Mark Thompson, Atkinson, Andelson, Loya, Rudd & Romo, Attorneys at Law, represented the Mountain View School District ("District").

Tamra Smith, Attorney at Law, represented Respondents Roxsana Casillas, Vivian Hufman, Kathleen Kerins, Balijinder Sekhon, Carrie Verplancke and Sheri Henningsen.

Eileen Fetters, Regional Uniserv Staff, California Teachers Association, represented Respondent Claudia Villavicencio.

No appearance was made by or on behalf of Respondents Kari Banuelos, Jeanne Chamberlain, Sarah Fisher, Cathleen Gregorek, Berit Levato, Amber Long, Karin Vasquez, and Jamie Wallace, whom the District classified as temporary certificated employees.¹

Before the hearing, the District withdrew the Accusation served on Kristy Paterson and rescinded her layoff notice.

At the conclusion of the hearing, the parties' request to submit written closing arguments was granted, a briefing schedule was established and the matter was submitted on May 5, 2011.

¹ The District asserted that, although temporary employees are not subject to these proceedings, temporary teachers received layoff notices because of issues raised regarding those individuals' employment status.

FACTUAL FINDINGS

1. David Creswell, Assistant Superintendent, Personnel and Administrative Services, Mountain View School District, made and filed the accusation in his official capacity.

2. The respondents whom the District identified as permanent certificated employees are listed in Appendix A², attached hereto and by this reference and incorporated herein. Each respondent is a certificated employee of the District.

3. The respondents whom the District identified as temporary certificated employees are listed in Appendix B, attached hereto and by this reference and incorporated herein. Respondents identified in Appendix B asserted that the District incorrectly identified them as temporary employees and that they were permanent certificated employees of the District.

4. On February 22, 2011, the Board of Trustees adopted Resolution No. 2010-11-08 reducing particular kinds of services and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution identified 7 regular certificated FTEs and 7.5 temporary certificated FTEs to be reduced. The Resolution stated that,

“Inclusion of temporary teaching positions in this reduction shall not be construed to confer any due process, procedural or reemployment rights upon any employee unless such rights are determined to exist under applicable statutes. Further, such inclusion shall not supersede or nullify any other action taken by this Board, past or future, that may affect the employment of such employees.”

5. Resolution No. 2010-11-08 defined “competency” for the purposes of bumping as “possession of: (1) a valid credential in the relevant subject matter area; and (2) highly qualified” status under the No Child Left Behind Act in the position to be assumed.”

6. Resolution 2010-11-08 stated that “as between certificated employees with the same seniority date, the order of termination shall be determined solely by Board-adopted criteria.”³

² Respondent Claudia Villavicencio received a precautionary layoff notice.

³ On January 19, 2010, the Board of Trustees adopted Resolution No. 2009-10-06 establishing tie-breaking criteria which the District used during this layoff proceeding.

7. On February 22, 2011, the Board of Trustees adopted Resolution No. 2010-11-09 determining that, pursuant to Education Code section 44954, all presently employed temporary certificated employees shall not be reemployed for the 2011-2012 school year and directing the Superintendent to give appropriate notices to certificated employees whose positions would be affected by the action. The resolution further determined that any temporary employee re-classified as a regular employee shall be afforded all applicable rights under the Education Code.

8. The District implemented a bump analysis to determine which employees could bump into a position being held by a junior employee. A senior teacher whose position is discontinued has the right to transfer to a continuing position which he or she is certificated and competent to fill. In doing so, the senior employee may displace or “bump” a junior employee who is filling that position. (*Lacy v. Richmond Unified School District* (1975) 13 Cal.3d 469, 473-474.)

9. Consistent with the Board’s Resolutions, the District identified certificated employees for layoff. The decision to reduce or discontinue a particular kind of service is a matter reserved to the district’s discretion and is not subject to second-guessing in this proceeding. (*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.) A school district’s decision to reduce a particular kind of service must not be fraudulent, arbitrary or capricious. (*San Jose Teachers Association v. Allen* (1983) 144 Cal. App. 3d 627, 637.)

10. The District considered attrition, resignations, retirements and requests for transfer in determining the actual number of necessary layoff notices to be delivered to its employees. No evidence was presented that any known positively assured attrition was not considered.

11. On or before March 15, 2011, the District timely served on respondents a written notice that the Superintendent had recommended that their services would be terminated at the close of the current school year. The reasons for the recommendation were set forth in these preliminary layoff notices.

12. An accusation was served on each respondent. All prehearing jurisdictional requirements were met.

Precautionary Layoff Issues

13. The District issued precautionary layoff notices to ensure that it could reduce its force in sufficient numbers as ordered by the Board. There was nothing improper in the district taking this precaution. Given the recommendations noted in this decision, at this juncture, none of the precautionary layoff notices can be rescinded until such time as the District complies with those recommendations. Some of the recommendations may result in employees who initially received a precautionary layoff notice being placed on the District’s

final layoff notice list; others may have their notices rescinded after the recommended actions contained in this order are completed.

Seniority Date for Respondents Who Attended Summer Training

14. The District asserted that respondents James Serian, Vivian Huffman, and Carrie Verplancke were part of a group of 15 teachers who shared a seniority date of September 3, 1998. The District used the tie-breaking criteria to determine which of those teachers were subject to layoff.

15. Respondents James Serian, Vivian Huffman, and Carrie Verplancke contended that the tie breaking criteria did not apply to them because their seniority date is August 24, 1998, not September 3, 1998. Each of them testified that they attended staff development training from August 24-27, 1998, for which they were compensated. Each of them testified that the staff development was not mandatory, was optional, but that they were encouraged to attend.

16. A memorandum regarding the August 24-27, 1998, staff development training sent to “All Teachers” from Terry Weatherby, Director, Curriculum/Personnel, advised that “teachers will be compensated for attendance at staff development . . . the actual rate of compensation has not yet been determined due to legislative delay in state budget finalization. No teacher can be required to attend these staff development days. However, I believe they will be well worth your time.”

17. Absent any evidence that the District “required” attendance at the August 24-27, 1998, staff development training, that date cannot be used to establish Respondents’ seniority date. The District correctly identified the seniority dates of respondents James Serian, Vivian Huffman, and Carrie Verplancke as September 3, 1998.

Issues Regarding Credentials Obtained After March 15, 2011

18. Respondent Kathleen Kerins possesses a Clear Multiple Subject Teaching Credential and currently teaches first grade. On February 23, 2011, she applied for her supplemental authorization in English which she received on April 13, 2011. Kerins asserted that, although she is not bilingual, her credential, supplemental authorization and her CLAD⁴ certification now authorize her to teach English to English language learners in the middle school, thereby allowing her to retain her employment with the district.

19. The District asserted that Kerins’ supplemental authorization does not entitle her to a “highly qualified status” because it is not a subject matter authorization. Kerins

⁴ “CLAD” (Crosscultural, Language, and Academic Development) certificates authorize instruction to English Learners.

admitted on cross-examination that she is three semester classes short of obtaining her subject matter credential, thereby currently rendering her not “highly qualified.”

20. Even assuming that Kerins’ supplemental authorization rendered her “highly qualified,”⁵ she did not have her supplemental authorization on March 15, 2011, the deadline for layoff notices to be served. A school district must issue and serve preliminary layoff notices no later than March 15. Before then, a district must consider all information on file that assists the district in making assignments and reassignments based on seniority and qualifications. After March 15 the district has no authority to issue a layoff notice to an employee who has become junior by reason of another employee’s filing proof of additional qualifications. Thus, the District was not required to consider a supplemental authorization for purposes of its lay-off determinations. (*Degener v. Governing Board of Wiseburn School District* (1977) 67 Cal.App.3d 689, 698-699.) The District properly considered all credentials existing on March 15 when determining which employees would receive notices. There was nothing arbitrary or capricious in the District establishing this cutoff date, and the use of that date was reasonable because the District was required by the Education Code to serve preliminary layoff notices by then.

Temporary Teacher Issues

21. The District identified nine certificated employees who were previously permanent teachers in the District, who were laid off in previous reduction in force proceedings and who were re-hired to teach in the District during the 2010-2011 under temporary contracts. Resolution 2010-11-09 directed the District to notify all temporary teachers that they were not being re-employed for the 2011-2012 school year. In this proceeding the District sought to release them as temporary employees, but out of an abundance of caution had served them with layoff notices, as well.

22. The nine respondents asserted that the District improperly offered them temporary contracts in violation of their rehire rights in the Education Code.

23. Respondent Sheri Henningsen possesses a Clear Multiple Subject Teaching Credential and possesses a supplemental authorization in Introductory English which she received on June 4, 2010. Henningsen introduced her Certificate of Compliance signed by the District documenting her “highly qualified” status in the District. Henningsen had prior experience nine years ago teaching English to English language learners.

24. Henningsen, who was previously employed by the District as a permanent teacher with a seniority date of November 27, 2000, was laid off during last year’s reduction in force proceeding. At the start of the 2010-2011 school year Henningsen initially job shared 50 percent teaching eighth grade English at middle school and on November 1, 2010, signed a temporary contract to teach first grade during the 2010-2011 school year.

⁵ The evidence established that Kerins was not “highly qualified.”

Henningsen asserted that she was incorrectly given a temporary contract and should have been re-hired as a permanent District employee.

25. Education Code section 44909 authorizes the District to hire temporary employees and outlines the rights of those employees. Most notably, the code section specifically provides that it does not apply “to any regularly credentialed employee who has been employed in the regular educational programs of the school district as a probationary employee before being subsequently assigned to any one of these programs.”

26. Education Code section 44918 outlines the rights of temporary employees but specifically holds that “permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.”

27. Education Code section 44954 authorizes Districts to release temporary employees.

28. Evidence Code section 44956 establishes the rights of permanent employees whose services are terminated. For 39 months, those employees have a preferred right of re-employment “in the order of original employment...if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render.” An employee may waive that right for and a district may deviate from re-employing in order of seniority if it “demonstrates a specific need” or to maintain or achieve “compliance with constitutional requirements.”

29. Section 44956 further provides that when the employee is reappointed, “the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service, he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any state or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement.” An employee may be hired as a substitute teacher but the substitute service shall not affect his previous classification and rights.

30. Taken together, these provisions show that the Legislature recognized that districts may need to hire and release temporary teachers, that those employees have various rights to re-employment and seniority status, but specifically distinguished those temporary employees from teachers who were formerly permanent or probationary employees of the district laid off during a reduction in force proceeding and then re-hired by the district. Former employees have rights superior to those of temporary or substitute teachers who were not formerly employed as permanent or probationary employees.

31. The District asserted that it properly labeled the nine respondents as temporary employees because the number of employees did not increase after last year's layoff and the discontinued service was not reestablished. However, that argument was specifically rejected in *Poppers v. Tamalpais Union High School District* (1986) 184 Cal.App.3d 339, 407. Citing to *Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 300, the *Poppers* court held that the California Supreme Court has determined that "the legislative intent underlying section 44956 is to provide terminated employees with the same employment rights they would have enjoyed had they been retained by the school district. (*Poppers, supra* at p. 405.) As between the reappointment rights of a senior terminated teacher vis-a-vis a junior teacher certificated and competent to perform the same services for the district, the senior teacher prevails. (*Poppers, Id.* at p. 407.)

32. Consistent with the Education Code and case law, the previously laid off employees had re-employment rights and when re-hired were entitled to be re-instated as though they had not been laid off. Accordingly, any of the nine respondents with sufficient seniority may bump into a position being held by a junior employee, despite their being improperly identified as a "temporary employee" by the District. Moreover, to allow a district to offer only "temporary contracts" to previously laid off employees not only violates the clear Legislative intent of the Education Code but would lead to the unjust result that an employee re-employed for 40 months as a temporary employee would lose his rights of re-hire, despite being re-employed each year. It was clear during this proceeding that most respondents were unaware that their "39 month clock" was running even when re-employed by the District because they were improperly told that they were working under a temporary contract.

33. Respondent Sheri Henningsen is certificated and competent to teach English at the middle school. Henningsen was improperly noticed and not allowed to "bump" a junior employee because Henningsen worked under a temporary contract during the 2010-2011 school year. If Henningsen is senior to a certificated employee who was not laid off, she can bump into that junior employee's position; her notice should be rescinded; and she should be retained.

34. Any of the nine respondents identified in Appendix B, who is certificated and competent, and who is senior to a certificated employee who was not laid off, was improperly noticed; the notice should be rescinded and that respondent should be retained.

Issue Involving Respondent Claudia Villavicencio

35. Respondent Claudia Villavicencio has a clear multi-subject credential and teaches English language arts, English language development and Culture at the middle school. The District has determined that she is "highly qualified" to teach middle school language arts. Villavicencio is the English language coordinator at her school and also works with special education English language learners. Villavicencio is the only bilingual coordinator left in the District; five years ago all were bilingual. She described her duties

which also include community outreach and family support and introduced a document outlining her duties. She receives a stipend for her English-language coordinator work.

36. Villavicencio admitted that there is not a credential for culture and that there are other English language coordinators at other schools although none of them are bilingual. Villavicencio admitted that her CLAD certification does not mean that she is bilingual, but authorizes her to work with English language learners.

37. Respondent Sheri Henningsen possessed the certification and competency to teach English at the middle school and had seniority over Villavicencio. Retaining Villavicencio and laying off Henningsen was improper as Henningsen could bump the Villavicencio. While Villavicencio's work in the District was certainly impressive the board of trustees could have elected to skip her position had it chosen to do so. Not allowing Henningsen to bump into Villavicencio's position merely because Henningsen worked under a temporary contract during the 2010-2011 school year was improper.

Special Education Issue

38. Respondent Baljinder Sekhon has a clear Level II education specialist mild/moderate credential, a clear multi-subject credential, and a CLAD certification. Since 2001 she has worked as a resource specialist and beginning in 2005 has also worked in a Special Day Class. She testified about the student teacher ratios may be waived allowing a resource specialist to work with more students. Sekhon described the voluminous caseload she carries and the concerns voiced during the current school year regarding the number of special education students being assigned to employees. She testified that the District hired a part-time specialist to assist with the special education students, but that individual is also being released with this layoff. Sekhon was concerned that the current layoff proceeding would make it impossible for the District to meet its student ratio requirements.

39. David Creswell, Assistant Superintendent, Personnel and Administrative Services, testified that the District does intend to comply with the law regarding student teacher ratio but is currently unsure as to how the special education classes will be offered next year as they are still awaiting information regarding the total number of special education students requiring services next year.

40. The services identified in the Board of Trustee's resolution to reduce or eliminate particular kinds of services were the kinds of educational services that properly could be reduced or discontinued. The reduction or elimination of those services was not arbitrary or capricious and constituted a matter within the proper exercise of the governing board's discretion. A school board may determine whether a particular kind of service is to be reduced or discontinued, and it cannot be concluded that the board acted unfairly or improperly simply because it made a decision that it was empowered to make under the statute. (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 174.)

41. A school board's decision to reduce or discontinue a particular kind of service is not tied in with any statistical computation. It is within the discretion of a school board to determine the amount by which it will reduce or discontinue a particular kind of service as long as a district does not reduce a service below the level required by law. (*San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 635-636.) Because the district has not yet determined how it will offer special education services for the 2011-2012 school year, it cannot be concluded at this juncture that particular kinds of services were proposed to be lowered to levels less than those levels mandated by state or federal law, especially in light of the District's representation that it does not intend to reduce any of the District's offerings in code mandated courses below the level required by law.

42. Sekhon's testimony did not establish that the elimination of the services being provided by certificated elementary special education instructors was arbitrary or capricious.

LEGAL CONCLUSIONS

1. Jurisdiction for this proceeding exists pursuant to sections 44949 and 44955, and all notices and other requirements of those sections have been provided as required.

2. A district may reduce services within the meaning of section 44955, subdivision (b), "either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may 'reduce services' by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved." (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

3. Because of the reduction of particular kinds of services, cause exists pursuant to Education Code section 44955 to give notice to respondents that their services will not be required for the 2011-2012 school year. The cause relates solely to the welfare of the schools and the pupils thereof within the meaning of Education Code section 44949. The district has identified the certificated employees who are providing the particular kinds of services that the Governing Board directed be reduced or discontinued. It is recommended that the Governing Board give respondents notice before May 15, 2011, that their services will not be required by the District for the school year 2011-12.

4. A preponderance of the evidence sustained most of the charges set forth in the accusation.

RECOMMENDATION

It is recommended that the governing board give notice to the respondents whose names are set forth below in Appendices A and B, except for those respondents identified above in the Findings of Fact Nos. 21-37, inclusive, that their employment will be terminated at the close of the current school year and that their services will not be needed for the 2011-2012 school year.

DATED: _____

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

Appendix A

1. Roxsana Casillas
2. Vivian Huffman
3. Kathleen Kerins
4. Balijinder Sekhon
5. James Serian
6. Carrie Verplancke
7. Claudia Villavicencio

Appendix B

1. Kari Banuelos
2. Jeanne Chamberlain
3. Sarah Fisher
4. Cathleen Gregorek
5. Sheri Henningsen
6. Berit Levato
7. Amber Long
8. Karin Vasquez
9. Jamie Wallace